

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

April 8, 1938.

AINAN BIN MAHAMUD                      Plaintiff.

vs.

1. SYED ABU BAKAR BIN HABIB YUSOFF
2. PUTEH KABARIAH BINTI MOHAMUD
3. SAUDAH BINTI MAHAMUD
4. RATITHAN BINTI MAHAMUD
5. SABARIAH BINTI MAHAMUD
6. MAT SAH                      -                      Defendants.

(PERAK CIVIL SUIT No. 111 of 1937)

*Evidence Enactment (Cap. 10) S. 112—Legitimacy—Mohammadan Law—Specific Relief Enactment (Cap. 5) S. 42.*

M executed a deed of settlement whereby he appointed the first defendant trustee upon trust to hold the land for the benefit of the children of the settlor living at the date of the settlement. Such children as were acknowledged by the settlor were the plaintiff, and the second, third, fourth and fifth defendants. The sixth defendant was the son and only child of a former wife of the settlor whom he had divorced. The settlor denied and the divorced wife asserted that he was the father of the sixth defendant. The sixth defendant knew nothing about the deed of settlement until the plaint in the suit was served on him. He neither put forward a claim to be interested under this settlement nor had he any opportunity of deciding whether or not to do so before the suit was commenced against him. A few days after the date of the execution of the deed of settlement the plaint was filed in which the plaintiff prayed *inter alia* for a declaration

- (a) that he and the second, third, fourth and fifth defendants were the natural and lawful children of the settlor, and
- (b) that the sixth defendant was not a natural and lawful son of the settlor and was not a beneficiary under the deed of settlement.

Held, that the Evidence Enactment is a statute of general application and that all the inhabitants of the Federated Malay States are subject to its provisions whatever may be their race or religion. In questions of legitimacy in the case of Muhammadans section 112 of the Evidence Enactment applies to the exclusion of the rule of Muhammadan Law.

Held, further that both the declarations sought by the plaintiff were outside the scope of section 42 of the Specific Relief Enactment because that section, which is exhaustive of the cases in which decrees merely declaratory can be made, does not enable a plaintiff to obtain a declaration about the legal character of any person except himself or a co-plaintiff. The words "interested to deny" do not include a person who has not in fact put forward a denial of the plaintiff's claim though it was conceivable that he might decide to do so. The words mean "interested to deny" by reason of some claim put forward by or on behalf of the person so "interested."

TRIAL OF ACTION.

J. L. Woods, S. Seenivasagam and Haji Abdul Wahab for the Plaintiff.

Kit Seng Khong for defendants Nos. 1—5.

E. D. Shearn and M. N. Cumarasami for the sixth defendant.

S. Seenivasagam—Three days after his marriage with Long Raayah, Mahmud bin Wahid discovered that she was pregnant. Thereupon he left her, and applied to the Naib Kathi for a divorce.

The Naib Kathi told Mahmud that he could not obtain a divorce from Long Raayah because the Mohammedan Law forbade a divorce during a wife's pregnancy.

So Mahmud had to wait until the child had been delivered, and then he divorced Long Raayah.

Thereafter Mahmud neither saw the child born to Long Raayah, nor contributed in any way to its maintenance and upbringing, nor in any way acknowledged that child as his.

That child is Defendant No. 6.

In 1922 Mahmud heard that Defendant No. 6's relations were making statements that Defendant No. 6 was Mahmud's son.

Mahmud complained to the Chief Kathi, but nothing was done.

Again, in 1937, Mahmud heard the Defendant No. 6 was claiming to be his son, and so, acting on legal advice, he made the settlement of 22.9.37, thereby enabling this question to be brought to Court.

Under Muhammadan Law a child born within six months of a marriage is illegitimate.

I propose to cite *Hamilton's Hedaya Mohammedan Laws*, Second Edition p. 137 in support of this proposition.

Shearn:—In *Ramah binti Ta'at v. Laton binti Malim Sutan*, 6 F.M.S.L.R. 128 it was held that Mohammedan Law is not foreign but local law. If that is so, then Mr. Seenivasagam is not entitled to read text books in support of his propositions unless and until it is shown that they state the law of the Federated Malay States.

Seenivasagam—In *Ramah binti Ta'at v. Laton binti Malim Sutan*, Thorne J. is not wrong in stating

that Mohammedan Law is the law of this land. I also agree that Thorne J. is right in saying "The Court must propound the law, and it is not competent to allow evidence to be led as to what is the local law". I claim, however, that I can cite any work on Mohammedan Law just as I could cite any work on Contract or Tort was the subject matter of this case concerned with either of those branches of the law.

*Held*, that Counsel may cite any standard works on Mohammedan Law.

*Seenivasagam*:—Second Edition *Hamilton's Hedaya Mussulman Laws*, p. 137.

Shafi is the only school of Mohammedan Law followed in Malaya.

See Baillie on Moohummudan Law of Inheritance, pages 36 and 46.

Even if the husband claims the child as his, on the ground that he had intercourse with its mother before his marriage with her, yet the child does not become legitimate.

See *Ameer Ali's Students' Hand-Book of Mohammedan Law* p. 70.

(*Ameer's Mohammedan Law*, Second Edition page 191).

See *Abdul Rahman's Institutes of Mohammedan Law*, First Edition page 185.

The paternity of a child born within six months of marriage is only established if the husband acknowledges it as his child.

Section 112 of Evidence Enactment—birth during marriage conclusive proof of legitimacy—raises a difficulty. In this case I intend to prove that there was no access when Sixth Defendant was conceived.

See *Ameer Ali's Students' Hand-Book* page 72.

(*Ameer's Mohammedan Law*. Fifth Edition page 201).

Section 112 of the Evidence Enactment embodies the English Rule of Law, and cannot be held to vary or supersede by implication the Rules of Mohammedan Law.

*Wilson's Digest of Anglo-Mohammedan Law* paragraph 81, paragraph 83, section 112 has no application to Muhammadans so far as it conflicts

with the Muhammadan Rule that a child born within 6 months after the marriage of its parents is not legitimate.

This point of conflict between section 112 of Evidence Enactment and the Rule of Mohammedan Law came before the Divorce Court of Allahabad in *Sibt Mohammad v. Mohammad Hammeed* A.I.R. (1926) All. 589, which decided that section 112 of the Evidence Enactment displaces the Rules of Mohammedan Law.

See *Bhagwan B. Singh v. Mahesh B. Singh* A.I.R. (1935) P.C. 199.

See *Ashrugood D.A.H.K. Bahadoor & Wazzeroon N. Begum v. H. H. Khan* 20 E.R. (P.C.) 37.

See *Habibu Rahman v. Chowdhary* I.C. Vol. 60 837.

*Shearn*—Section 112 of the Evidence Enactment is of importance to our case.

We rely on—

The marriage on 8.5.1910, and

The birth in March 1911.

The marriage was consummated on the day of the wedding, and intercourse continued for some time. In regard to section 112 of the Evidence Enactment, that section and that alone applies to this case.

See *Ameer Ali* Ninth Edition pp. 795 and 797.

There are no other statutory provisions relating to proof of legitimacy in the Federated Malay States, but there are such other Statutory Enactments in India. See "table of Enactments applying Muhammadan Law to India" after p. 33 of *Tyabji*

Now see *Muhammad A. Khan v. Muhammad I. Khan*. (1888) 10 All. 289, 305.

In the light so afforded I invite the Court to reconsider *Sibt Mohammad v. Mohammad Hammeed*. (A.I.R. (1926) All. 589.) cited by Mr. Seenivasagam.

The point for decision there was whether Muhammadan Law was to prevail because of the Bengal, Agra and Assam Civil Courts Act (1877) or whether section 112 of the Evidence Act was to prevail.

In this country all we have are Caps. 196, 197 and 198, and in none of those Enactments are there

any provisions similar to those set out in the Table after page 33 in *Tyabji*.

Therefore there can be no conflict between section 112 of the Evidence Enactment and any rule of Mohammedan Law. If I succeed in proving that Mat Sah was born in 1911, he is, by law, Mahmud's son because the latter admittedly had access to Long in May 1910.

I assume that the plaintiff is asking for the two declarations in paragraph 9 of the Defence under section 42 of the Specific Relief Enactment.

This section 42 confers a limited right to ask for a decree in certain circumstances. There is no other section which the Plaintiff can pray in aid.

See *Collett* on Specific Relief Act 5th Ed. page 291.

*Note*:—This passage is not in the 4th Edition.

The Plaintiff cannot get the Declarations which he seeks in paragraph 9 of his Plaint. On the other hand the Sixth Defendant is entitled to the Declaration he claims in his counterclaim.

The Plaintiff's second declaration is quite outside the scope of section 42 of the Enactment.

See *Pollock and Mulla* Fifth Edition page 916, and pages 917 to 919.

Section 42 is exhaustive of the cases in which a decree merely declaratory can be made.

The Plaintiff's first declaration is bad in that it asks for a declaration in regard to the legal character of persons other than the Plaintiff. The Sixth Defendant has no objection to a declaration that the Plaintiff is a lawful son of Mahmud.

The second of Plaintiff's declarations is clearly bad:

See *Choi Wai Ying v. Cheong Weng Chan and others*. (1933-1934) F.M.S.L.R. 191; 2 M.L.J. 301.)

The Sixth Defendant has never denied the Plaintiff's legal character or his right to any property.

See *Collett* 5th Ed. page 295. See 4th Ed. page 299. In this connection I invite attention to Ex. H. Even if Ex. H. can be regarded as the Sixth Defendant's own letter, it amounts to no more than an intimation that the Sixth Defendant is claiming to be a son of Mahmud. What

the Plaintiff asks is a declaration as to the legal character of the Plaintiff himself and Fourth Defendant, though they cannot show that the Sixth Defendant has ever denied that legal status. He, secondly, asks for a declaration as to the legal character of a person other than himself, though under section 42 of the Enactment he is not entitled to any such declaration. Even had the Plaintiff asked for a declaration that he was entitled to an equal fifth share in the trust property, he would not be entitled to that declaration unless he established that the Sixth Defendant had disputed his right to such one equal fifth part. The mere claim of the Sixth Defendant to be a son of Mahmud would not be enough. The Sixth Defendant had no knowledge of the settlement of 22.9.37 until this action was commenced. The proper course would have been for the trustee to ask Sixth Defendant whether he made any claim to a share in the property, and then, had the Sixth Defendant made any, to have brought a suit against him claiming that he was not a son of Mahmud, or to have told the Sixth Defendant that he must establish his claim in Court.

I rely on:

*Wajib Ali Shah v. Dianat-ul-Lah*. (I.L.R. 8 All. 31.)

*Colvin v. Elias*. (Sutherland W.R. Vol. 11, 40, 41.)

The hostile act must be antecedent to the bringing of the suit and not subsequent to it.

*Jenaram v. W. Panda*. (Sutherland W.R. Vol. 9, 324.)

*H. Khelawun Singh v. M. O. Kooer*. (Sutherland W.R. Vol. 21, 101, 103.)

Section 15 of the Indian Civil Procedure Code of 1859 reads as follows:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

This section 15 of the 1859 Act is the same as Order 25 Rule 5 of the Rules of the Supreme Court of England.

See notes thereunder and *re Clay*. ((1919) 1 Ch. 66.)

I am now inviting the Court to dismiss the Plaintiff's suit on the ground that the declaration asked for cannot be made, and no application has been made for leave to amend the plaint.

I also submit that no application to amend can be granted because of the rule that no amendment will be allowed where it is clear that after amendment the suit must fail.

This suit will fail, whatever amendment is made, because the Sixth Defendant has never made any claim to the settled property. The Court of Appeal here has held that all amendments must be deemed to date to the commencement of the writ. *Murugappa Chetty v. Seenivasagam* (1936) F.M.S.L.R. 33, at page 34. 5 M.L.J. 217.

The Sixth Defendant had made no claim of any sort at the date of filing the plaint.

The Court should dismiss the Plaintiff's suit with costs and decide the real issue between the parties on the Counterclaim.

*J. L. Woods*—Mr. Shearn has relied very largely on cases on sections other than section 42 of the Specific Relief Enactment.

Section 42 is very much wider than section 15 of the 1859 Indian Civil Procedure Code or Order 25 Rule 5 of the Rules of the Supreme Court of England.

See *Pollock and Mulla*, Contract and Specific Relief Acts 5th Ed. page 915 and page 916.

In Declaration (1) we are asking for a declaration that "the Plaintiff and Second, Third, Fourth and Fifth Defendants are the only natural and lawful children" of Mahmud. It is not necessary that the Sixth Defendant should have put forward a claim to be a natural and lawful son of Mahmud. The Sixth Defendant is "interested to deny" the Plaintiff's claim to be the only natural and lawful son of Mahmud. Plaintiff is asking for a declaration that he is entitled to the legal character of the only "natural and lawful son" of Mahmud.

It is unnecessary that Plaintiff should ask for a declaration as to a right to property. Now see page 920 *et seq.*

A Plaintiff may sue for a declaration that the Defendant is not his son (*Vaktuba v. Agarsingji*. (1910) 34 Bombay 676.)

(Aitken J. Do you contend that there has been an open assertion of a definite claim to be a son of Mahmud made either by or on behalf of Mat Sah in this case.)

*J. L. Woods*.—No.

I also rely on *Chinnasami Mudaliar v. Ambalavana Mudaliar* (29 Madras (1906) 48.)

(Aitken J. In this case a perfectly definite claim to be the adopted son of the Plaintiff was openly asserted on behalf of the child. What evidence is there in this case of any definite claim to be a son of Mahmud having been put forward by Mat Sah, or his mother Long Raayah or any one on his behalf before action commenced.)

I rely on the entry of Mat Sah in the school.

He was entered by someone as "Mat Sah bin Mahmud" in those books. That entry constitutes a definite claim that Mat Sah was a son of Mahmud bin Wahid.

I rely on Ex. H. written by Elias.

Therein Mat Sah is referred to as "Mat Sah bin Inche Mahmud". Elias had given some signed statement to Mat Sah or his Solicitors.

See *In re Stoer*. (P.D. 120.) In that case there was no definite claim before Cotton L. J. made his suggestion.

I rely on: *Chait Singh v. Yzing Tsze Sam*. (F.M.S.L.R. (1936) 214; 6 M.L.J. 53.)

I say that some meaning should be given to the words "any person.....interested to deny".

*Shearn*.—All the evidence for the Plaintiff comes to this: That there has been some talk about Mat Sah being Mahmud's son. On that the Plaintiff has launched this suit, without taking the trouble to ascertain from the Sixth Defendant beforehand whether he claims to be a lawful and natural son of Mahmud or not.

A lawful son has no vested interest in his father's property until he is dead and the son survives him. See *Collett* 5th Ed. Page 294.

So also the Plaintiff is not asking for a declaration of his legal character alone, but for a declaration of the legal character of himself and four others.

The two cases about fathers applying for declarations of non-paternity are different to this, because in them the claims immediately gave rise to disputes in regard to property.

The putative children could claim for maintenance, if their claim to be children were established,

and in the last case the putative child would become a coparcener.

The only property to which Mat Sah could have made a present claim was the settled property of which he had no knowledge until suit was brought. The four Defendants should have been Plaintiffs if they wanted a declaration as to their legal character.

See Duke, L. J.'s judgment in *Re Clay (ubi supra)*.

*Cur. Adv. Vult.*

**Aitken, J.**—The Plaintiff, and the second, third, fourth and fifth Defendants are the acknowledged children of an old and rich Malay gentleman called Mahamud (or Mahmud) bin Wahid. (As I shall have to refer to this old gentleman very often in the course of this judgment, I shall refer to him simply as "Mahmud", thereby adopting the same way of spelling his name as I adopted when taking my notes of the evidence).

The first Defendant is married to the third Defendant, and thus son-in-law of Mahmud.

The sixth Defendant is the son and only child of a former wife of Mahmud named Long Raayah binti Lias, whom he divorced on the 12th of September 1910. Mahmud denies, and Long Raayah asserts, that he is the father of Mat Sah.

On the 22nd of September 1937 Mahmud and his son-in-law the first Defendant executed the following deed of settlement:—

"THIS SETTLEMENT is made the 22nd day of September 1937 Between MAHAMUD BIN WAHID (hereinafter called the Settlor) of the one part and SYED ABU BAKAR BIN HABIB YUSOFF (hereinafter called the Trustee which term where the context admits include the trustee or trustees for the time being) of the other part.

WHEREAS the settlor is desirous of making provision for the benefit of his children living at the date of these presents.

AND WHEREAS the settlor has transferred the land described in Grant for Land 211 in the mukim of Ulu Kinta in the State of Perak into the name of the trustee by an instrument of transfer bearing even date to the intent that the same may be held upon the trusts hereinafter expressed.

NOW IN CONSIDERATION of the premises this deed witnesseth as follows:—

The trustee shall hold the said land so transferred to him as aforesaid in trust for the children of the settlor living at the date of these presents in equal shares both as to income and as to corpus."

It is common ground that the sixth Defendant, to whom I will henceforward refer as Mat Sah, knew nothing about this deed of settlement until the plaint in this suit was served on him on the 23rd of October 1937. I mention that admitted fact now, because this deed of settlement was nothing more than a mere device to enable the Plaintiff to bring a suit against Mat Sah for a declaratory decree; and in the view I take of section 42 of the Specific Relief Act it is of some importance that Mat Sah neither put forward a claim to be interested under this settlement, nor had any opportunity of deciding whether or not to do so, before this suit was commenced against him.

The plaint itself is dated the 29th of September 1937, that is, only 7 days after the execution of the deed of settlement set out above, and the material allegations therein may be stated concisely as follows:—

1. The Plaintiff and the second, third, fourth and fifth Defendants are Mahmud's natural and lawful children.
2. Mahmud was married to Long Raayah at Kampong Tualang Tujoh in the Kinta District on or about the 9th of May 1910.
3. At the time of such marriage Long Raayah was in a state of pregnancy, but Mahmud was unaware of that fact.
4. In or about the month of August, 1910, Long Raayah was delivered of a child who is the sixth Defendant Mat Sah.
5. On or about the 12th of September 1910, Mahmud pronounced a divorce of one degree over Long Raayah, and the marriage between them was dissolved.
6. On the 22nd of September 1937, Mahmud and the first Defendant executed the deed of settlement set out above, after the plot of land therein mentioned had been transferred by Mahmud to the first Defendant.
7. The sixth Defendant Mat Sah claims that he is a natural and lawful son of Mahmud, and a beneficiary under the said deed of settlement.

Upon these allegations the Plaintiff prayed for:—

- (a) A declaration that he and the second, third, fourth and fifth Defendants are the only natural and lawful children of Mahmud;
- (b) A declaration that the sixth Defendant Mat Sah is not a natural and lawful son of Mahmud, and not a beneficiary under the said deed of settlement;
- (c) Any further or other relief that the Court might think fit to grant; and
- (d) Costs.

To this plaint the first five Defendants filed a so called "Statement of Defence", admitting all the allegations contained in the plaint, denying that the sixth Defendant Mat Sah was a natural or lawful son of Mahmud or a beneficiary under the said deed of settlement, and consenting to judgment in terms of the prayers set out in the plaint.

The sixth Defendant Mat Sah filed a real defence with a counter-claim added thereto. In his defence—

- (a) He declined to make any admission as to the paternity of the Plaintiff, and the second, third, fourth and fifth Defendants.
- (b) He admitted that Mahmud was married to Long Raayah at Kampong Tualang Tujoh.
- (c) He denied that Long Raayah was in a state of pregnancy at the time of her marriage with Mahmud.
- (d) He admitted that Long Raayah is his mother, but stated that he was born in or about the month of March 1911, and not in or about the month of August 1910.
- (e) He declined to admit the allegations in the plaint as to his mother's divorce from Mahmud.
- (f) He admitted the execution of the deed of settlement of the 22nd of September 1937, a copy of which was annexed to the plaint.
- (g) He asserted that he is a natural and lawful son of Mahmud, but denied that he had put forward any claim to be a beneficiary under the said deed of settlement before the institution of this suit.

Finally he pleaded that the Plaintiff is not entitled to obtain the declarations asked for in his plaint.

In his counter-claim Mat Sah repeated the allegations and pleas in his defence which I have set out above as (b), (c), (d), (e) and (f). He then reiterated his averment that he was a natural and lawful son of Mahmud, and set up a claim that he is a beneficiary under the said deed of settlement. His counterclaim ends with a prayer for a declaration that he is a natural and lawful son of Mahmud and a beneficiary under the said deed of settlement; further and other relief; and costs.

The pleadings came to an end with a reply by the Plaintiff to Mat Sah's counter-claim joining issue with him on his averment that he was the lawful and natural son of Mahmud, and praying that the counter-claim might be dismissed with costs.

Now on these pleadings it is clear that one issue of paramount importance is raised, and that all the other questions in issue are merely subsidiary thereto. That paramount issue may be settled thus, is Mat Sah the natural and lawful son of Mahmud; and before I proceed to consider and discuss the very considerable amount of evidence which has been adduced to prove or disprove Mat Sah's paternity, I must endeavour to ascertain to what extent such an issue is affected by the law of the land.

All the parties concerned in this case are Muhammadans, and if our Enactments were silent on the point, I should have no hesitation in holding that the question of Mat Sah's legitimacy must be dealt with and decided in accordance with Muhammadan Law. We have, however, a section of the Evidence Enactment which provides that the birth of a child during a valid marriage or within 280 days after its dissolution, is conclusive proof of legitimacy, unless it can be shown that "the parties to the marriage had no access to each other at any time when the child could have been begotten".

It was suggested, on behalf of the Plaintiff, that this section 112 of the Evidence Enactment does not apply to the Muhammadan inhabitants of the Federated Malay States, and one or two Indian cases were cited in support of that view. But those cases arose in parts of India to which Muhammadan Law has been expressly applied by Statutes enacted by the competent legislature, and there are no such express provisions to be found in our Statute Law. I hold,

therefore, that our Evidence Enactment is a Statute of general application, and that all the inhabitants of the Federated Malay States are subject to its provisions, whatever may be their race or religion. As a matter of principle I do not see how I could come to any other conclusion; but if authority is wanted, the case of *Sibt Mohammad v. Mohammad Hameed*, (A.I.R. (1926) All. 589) strongly supports the view I have taken.

Having thus decided that section 112 of the Evidence Enactment applies to this case, it will make for clarity if I set out its provisions in full and contrast them with the provisions of Muhammadan Law in regard to the same subject matter. Another reason for making such a comparison is that I intend, when my examination of the evidence is complete, to deal with that paramount issue "is Mat Sah the natural and lawful son of Mahmud" both from the stand point of section 112 of the Evidence Enactment and from the stand point of Muhammadan Law. It may be that I have fallen into error in deciding that section 112 of the Evidence Enactment ousts the provisions of the Muhammadan Law in regard to legitimacy, and it would be little short of tragic were the parties to be compelled to litigate this question again because I am wrong on a point of law.

Section 112 of the Evidence Enactment reads as follows:—

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten".

This section, following the English Law, adopts the period of birth, as distinguished from conception, as the turning point in all questions of legitimacy. Birth within either period specified in the section is "conclusive proof" of legitimacy, unless it can be shown that there was non-access. That is the only way in which the presumption created by this section can be rebutted, and those who seek to rebut the presumption must prove that sexual intercourse between the parties did not take place at any time when, by such intercourse, the husband could, according to the ordinary course of nature, be the father of the child.

Under the Muhammadan Law questions of legitimacy are referred to the date of the conception of the child, and not to the period of its birth. Thus, to quote from *Baillie on Moohummudan Law of Inheritance*, page 36, "To establish the descent of a child from a man, it is necessary that the relation between its parents, which legalises their intercourse, should have subsisted at the supposed period of its conception. Accordingly, if a married woman should produce a child within six months from the date of her marriage, which is the shortest period of gestation in the human species according to the Moohummudan lawyers, its descent is not established from her husband unless he claims it; and even in the event of his claiming it, if he should admit that it was the fruit of fornication, its descent is not established". I do not think that I need quote passages from other authorities on Muhammadan Law in support of this view, because all of them appear to be agreed that the paternity of a child born within six months of marriage is only established if the husband acknowledges that the child is his.

At the close of the Plaintiff's case Mr. Shearn, for Mat Sah, submitted that the Plaintiff's claim should be dismissed with costs because the Plaintiff could not, on the evidence and in view of the provisions of section 42 of the Specific Relief Enactment, obtain either of the declarations he sought or any other declaration as to his legal character or his right to any property.

In order to make Mr. Shearn's submission and arguments clear, it appears to be necessary to set out section 42 of the Specific Relief Enactment in full, and desirable to restate the declarations sought by the Plaintiff in the prayer to his plaint.

Section 42 of the Specific Relief Enactment reads as follows:—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the Plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee".

The declarations sought by the Plaintiff are as follows:—

- (1) A declaration that the Plaintiff and the second, third, fourth and fifth Defendants are the only natural and lawful children of Mahmud, and
- (2) A declaration that the sixth Defendant (Mat Sah) is not a natural and lawful son of Mahmud, and not a beneficiary under the trust created by the deed of settlement of the 22nd of September 1937.

Mr. Shearn contended that—

- (1) Section 42 of the Specific Relief Enactment is exhaustive of the cases in which a decree merely declaratory can be made, and that the Courts of the Federated Malay States have no power to make such a decree independently of that section.
- (2) Section 42 does not enable a Plaintiff to obtain a declaration as to the legal character of any person other than himself or a co-plaintiff.
- (3) The opening words of section 42, "any person entitled to . . . . . any right as to any property", refer only to persons entitled to a present right in some property; and the only such right to which the Plaintiff is entitled is his right under the deed of settlement of the 22nd of September 1937, which has never been denied by Mat Sah, and which Mat Sah was never in a position to deny, being, admittedly, entirely unaware of that deed of settlement before this suit was instituted.
- (4) No amendment of the plaint can save the Plaintiff's claim in this suit, because all amendments must be deemed to date back to the commencement of the suit and no claim to the settled property, or to be a son of Mahmud, had been put forward by or on behalf of Mat Sah until after this suit was instituted.

To show how unwilling the Courts are to make a declaratory order when no claim adverse to the

Plaintiff has been put forward, Mr. Shearn cited three Indian cases on section 15 of the Indian Civil Procedure Code of 1859, which is the forerunner of section 42 of our Specific Relief Enactment, namely—

*Wajid Ali Shah v. Dianat-Ul-Lat Beg* (8 All. 31.)

*Colvin v. Elias* (Sutherland's W.R. Vol. XI 40.)

*Kenaram v. D. Panda* (Sutherland's W.R. Vol. IX 325.)

He also cited the English case of *re Clay* ((1919) 1 Ch. 66.), which is a decision on Order 25 rule 5 of the Supreme Court of England—a rule worded in much the same way as the above mentioned section 15 of the Indian Civil Procedure Code of 1859, and he drew my attention to the case of *Choi Wai Ying v. Chong Weng Chan and others* ((1933-1934) F.M.S.L.R. 191; 2 M.L.J. 301.), which is a decision on section 42 of our Specific Relief Enactment.

Mr. Woods, for the Plaintiff, made no attempt to contest the first two of Mr. Shearn's contentions, but in regard to the third and fourth he pointed out that the scope of section 42 of the Specific Relief Act is wider than the scope of either section 15 of the Indian Civil Procedure Act of 1859, or of Order 25 Rule 5 of the Rules of the English Supreme Court, in that, under the former, a declaratory decree may be passed even though the Plaintiff can show no right to any consequential relief. He admitted that the evidence adduced in support of the Plaintiff's claim failed to establish that any open or definite claim to be a natural and lawful son of Mahmud had ever been put forward by or on behalf of Mat Sah before this suit was instituted, but he argued that, by virtue of the Deed of Settlement of the 22nd of September, 1937, Mat Sah had become a person "interested to deny" the Plaintiff's claim that he was the only natural and lawful son of Mahmud, and he appeared to suggest that the prayer at the end of the plaint might be amended so as to ask for declaration to that effect. He cited the case of *Chiat Singh v. Tzing Tsze Sam* ((1936) F.M.S.L.R. 214; 6 M.L.J. 53.) to show that the Courts of the Federated Malay States should always give leave to amend the prayer to a plaint if any relief can be given to the Plaintiff on the facts pleaded in the body of the plaint.

Before I proceed to discuss this argument and the two cases on section 42 of the Indian Specific Relief Act which were cited by Mr. Woods, I think it will be convenient if I set out here the provisions

of section 15 of the Indian Civil Procedure Code of 1859, since that Code is not readily available now. That section provides that "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief". It will be seen that its provisions are very similar to those of Order 25 Rule 5 of the Rules of the English Supreme Court, and the Courts in India, when construing its provisions, followed the decisions of the English Supreme Court construing Order 25 Rule 5 of its Rules.

Now in one sense of the words used I agree that Mat Sah was "interested to deny" the Plaintiff's claim to be Mahmud's only son, although he himself had never put forward any claim to be a son of Mahmud, because it was conceivable that he might decide to do so; and if he did, then he would almost certainly claim to be beneficiary under the deed of settlement which Mahmud executed for the purposes of this suit and for no other purposes. But if that is the sense in which the words "interested to deny" in section 42 of the Specific Relief Enactment are to be construed, then such an action as this might quite properly be brought against every man living in Kampong Kepayang who is of such an age that he might, conceivably, be a son of Mahmud. Personally, I find it impossible to construe them in that sense, and when they are read together with the other words in that section I hold the view that they mean "interested to deny" by reason of some claim put forward by or on behalf of the person so "interested".

Mr. Woods cited two cases on section 42 of the Indian Specific Relief Act, in which men were granted decrees declaring that certain children were not their respective sons. These cases are *Chinnasami Mudaliar v. Ambalavana Mudaliar* (I.L.R. Madras Series (1906) Vol. 29, 48.) and *Agarsinghji Raisinghji* (I.L.R. Bombay Series (1910) Vol. 34, 676.) To my mind both of them support the conclusion at which I have just arrived in regard to the meaning of the words "interested to deny" in section 42 of our Specific Relief Enactment, and I rely in particular on the opening passage of the judgment in the Madras case, and the passage about the Plaintiff's hand having been forced by an "open assertion of a definite claim" on behalf of the minor Defendant at page 684 in the judgment in the Bombay case. There was certainly no "open assertion of a definite claim" by Mat Sah in this case before the Plaintiff instituted his suit.

It is now possible to summarise my reasons for dismissing the Plaintiff's claim at the close of his case. I was of opinion that both the declarations sought by the Plaintiff were quite outside the scope of section 42 of the Specific Relief Enactment because that section, which is exhaustive of the cases in which decrees merely declaratory can be made, does not enable a plaintiff to obtain a declaration about the legal character of any person except himself. I was also of opinion that no amendment of the prayer could be devised which would enable the Plaintiff's suit to proceed any further, because no open assertion of any definite claim to be a son of Mahmud had ever been made by or on behalf of Mat Sah before the suit was instituted, and therefore he could not properly be described as a "person denying or interested to deny" the Plaintiff's title to any legal character or right.

*Judgment accordingly.*

[ORIGINAL CIVIL JURISDICTION]

CUSSEN, J.

June 15, 1938.

RM. PL. N. NACHIAPPA CHETTIAR

(Plaintiff).

v.

K. AL. KR. OTHERWISE KR. AL. OTHERWISE  
K. AL. KARUPPAN CHETTIAR AND OTHERS.

(Defendants).

(SELANGOR CIVIL SUIT No. 94 of 1936)

*Partnership—Joint Hindu Family—Liability for debts of firm—Infant partner—Benefits.*

Where a Hindu trading family carries on a joint family business, whether that business be ancestral or new, the manager and all adult male members of the family who take an active part in the conduct and management of the business are personally liable for debts.

A Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business does not necessarily become a member of the trading partnership which carries on the business. To render him liable as a partner the evidence must show some definite benefit accruing to the infant in excess of and quite distinct from anything to which he is entitled and would ordinarily receive merely by virtue of his position as a member of the joint family.

TRIAL OF ACTION.

V. Mackie for Plaintiff.

A. J. Bostock-Hill for Second and Fifth Defendants.

Cussen, J.—In this suit the Plaintiff is suing the five Defendants personally for a sum of \$6,943/- being the amount due as capital and interest in respect of certain loans made by him to the business or firm